REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 59 OF 2019

CHARLES WAHOME KIBOI.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAY AUTHORITY....1ST DEFENDANT/RESPONDENT

CHINA WU-YI LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **29th March 2019,** bought under **Order 40 Rules 1** & **4, Order 51 Rules 1** and **3** of the **Civil Procedure Rules**, **Sections 3A, 63 (c**)and **(f**) of the **Civil Procedure Act,** which application has been brought by the Plaintiff/Applicant herein who seeks for the following orders; -

> **1. That the Honourable Court be pleased to grant an interim injunction restraining the Defendants/Respondents, their agents, servants and employees from entering into, alienating or taking possession of the parcel of land known as Dagoretti/Kinoo/3954, and destroying, demolishing or in any way interfering with the buildings erected thereon, pending the hearing and determination of this suit.**
>
> **2. Costs be borne by the Defendants.**

The Application is supported by the Affidavit of **Charles Wahome Kiboi, who averred that he** is the registered owner of **Land Parcel Dagoretti/Kinoo/3954,** and he has erected a residential permanent building on the said parcel of land. He further averred that his land is not on a **Road Reserve** and further, his land has not been **acquired compulsorily** by the Government. That the Defendants/Respondents have marked the perimeter wall of the land with an **"X"** and promised to demolish the same.

It was his contention that his advocates on record have written demand letters dated **18th July 2018,** and **5th September 2018,** which have not elicited any responses. That if an Order of injunction is not granted, then the property shall be alienated and by the time the suit is heard and determined, the property shall have been lost, occasioning him irreparable damage.

The said Application is opposed by the 1st Defendant/Respondent through its **Preliminary Objection**, which was found **not** merited by this Court's Ruling dated **23rd January 2020**. It further filed a Replying Affidavit dated **27th October 2020,** by **Daniel Mbuteti,** who averred that the rehabilitation and enhancement of the road has necessitated

compulsory acquisition of the land adjacent to the road.

He further averred that the Applicant's **Land Parcel No. Dagoretti/Kinoo/3954,** is neither within the project and is not among the acquired properties, and that they never issued any **notice** of intention in accordance with **Land Act** for **Compulsory Acquisition**. That the Applicant's Application lacks merit and has no affiliation whatsoever with the **James Gichuru-Rironi Road Project,** as it neither passes through his property and neither does it touch on part of his property.

The 2nd Defendant/Respondent filed its Replying Affidavit dated **26th June 2020** by **Frank Zhao Xin,** who averred that it is a stranger to the averments and have in no way started any demolition of any residential units nor has it marked **"X"** on any property earmarked for any demolition. That if the suit property has encroached on the road reserve, it would fall in the ambit of the 1st Respondent herein. It was his further contention that the onus to prove that his rights have been threatened would fall on the Plaintiff/Applicant and prays that the suit in general be dismissed with costs.

Parties were directed to file written submissions to canvass the instant Application. The Applicant filed his Submissions on **26th October 2020,** through the **Law Firm of Mwangi Wahome &Co. Advocates,** while the 1st Defendant/Respondent filed its written submissions on

15th November 2020, through **Law Firm of Kaloki Ilia &Co. Advocates.** The 2nd Defendant/Respondent filed its written submissions dated **9th November 2020,** through the **Law Firm of MS Law Advocates LLP.**

The Court having laid down the background of this case and having considered the Application in general, the Replying Affidavits, rival Written Submissions and the cited Authorities relied upon, finds the main issue for determination is;

i. *Whether the Applicant deserves the Orders sought in his Application dated **29th March 2019.***

(i) Whether the Applicant deserves the Orders sought in his Application dated 29th March 2019.

The Applicant having sought for Injunctive Orders, is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at the Interlocutory stage. See the case of ***Airland Tours and Travel Ltd…Vs…National Industrial Credit Bank, Milimani HCCC No.1234 of 2003***, where the Court held that: -

> **"In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".**

In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of ***Giella … Vs… Cassman Brown Co Ltd (1973) EA 358, which are; -***

> ***"First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.''***

Firstly, the Applicant needs to establish that he has a *prima-facie* case with probability of success. A prima-facie case was described in the case of ***Mrao Ltd…Vs…First American Bank of Kenya Ltd & Others (2003)KLR***, to mean: -

> **"A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".**
>
> **Further, Mustill J describe prima facie case as;**
>
> **"to be a good and arguable case which connotes one which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50% chance of success".**

It is the duty of the Plaintiff/Applicant herein to establish that he has a ***prima-facie* case**. In the instant suit, there is no doubt that the Plaintiff/Applicant herein is the registered owner of **Land Parcel No. Dagoretti/Kinoo/3954.**

The Applicant's contention is that the Defendants/Respondents without any justification have earmarked his structure for demolition with an **"X"** sign. On his part, the 1st Defendant/Respondent has denied the said allegations and averred that the Applicant's **Land Parcel No. Dagoretti/Kinoo/3954,** is neither within the projects and is not among the acquired properties earmarked for road expansion. While the 2nd Defendant/Respondent avers that if the suit property has encroached on the road reserve, it would fall in the ambit of the 1st Respondent herein.

From the Certificate of title attached as an annexture herein, unless contrary evidence is produced, the Court finds and holds that the Plaintiff/Applicant has beneficial interest over the suit property.

Though the Court would require evidence to confirm whether the Plaintiff's/Applicant's parcels of land known as **Dagoretti/Kinoo/3954,** has encroached on the road reserve, the Court finds that the evidence of attempted demolition by the Defendants/Respondents or any other party concerned, is *prima facie* proof that the substratum of the suit properties would be interfered with. Thus, this Court finds and holds that the Plaintiff/Applicant has established that he has a prima facie case with probability of success at the trial.

Secondly, If the Defendants/Respondents are allowed to proceed and interfere with the Plaintiff/Applicant's building by demarcating and establishing the extent of encroachment, or in any way demolishing or interfering with the building erected, the same would change the land scape of the area and in the event the Plaintiff/Applicant is a successful litigant at the end of the main trial, then he would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See the case of **Olympic *Sports House Ltd…Vs…School Equipment Centre Ltd (2012) eKLR***, where the Court held that: -

> ***"a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction".***

On the balance of convenience, the Court finds that it tilts in favor of maintaining the **status quo,** and the **status quo** herein is not to allow any

demolition until the suit is heard and determined. See the case of ***Virginia Edith Wambui…Vs…Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR***, where the Court of Appeal held that: -

> ***"The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."***

The Court notes that the Plaintiff/Applicant despite establishing a **prima facie** case, has not fully elaborated who put the **"X''** sign, but the said evidence can be availed during the hearing of the main suit herein. There is clearly a need for ascertainment of facts and probing of evidence that must be done at the full trial. Therefore, the issue of whether or not the Plaintiff/Applicant has encroached on road reserve should be dealt with during the main trial of the substantive suit herein.

Having now carefully read and considered the Applicant's Notice of Motion Application dated **29th March 2019**, the Court finds it **merited** and the same is allowed entirely in terms of prayers 3 and 4, and thus costs of the application to be borne by the Defendants/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki